No. 80-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY, *Petitioner*,

v.

JANET CENANCE, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION

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February 13, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. The Petitioner has consented to the filing of such brief, as have some of the Respondents. The remaining Respondents have not, as yet, replied to our requests for consent. When such written consents are received, they shall be promptly filed.

Interest of the American Bankers Association

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. Its membership comprises approximately 90% of all American banks. As of the latest date for which figures are available,* commercial banks hold about 53% of all outstanding automobile-related installment credit, ($61.8 billion) compared to 29% ($33.8 billion) for finance companies, including, but not limited to automobile finance companies such as Ford Motor Credit Company. Of the automobile-related credit extended by commercial banks, about 43% ($26.5 billion) is extended directly to individuals; the remaining 57% ($35.3 billion) is so-called "indirect paper," *i.e.*, loans which are purchased from automobile dealers or other extenders of credit, under arrangements similar to those involved in this case. Consequently, the banking industry has a considerable stake in the outcome of any case which could impose upon banks new and unanticipated responsibilities and exposure to liabilities. This is such a case.

Since commercial banks deal both directly with automobile purchasers and with automobile dealers, as opposed to automobile finance companies which deal only with the dealers, and since many commercial banks are directly regulated and examined by the federal agency responsible for promulgating and interpreting Truth in Lending regulations, the industry is in a position to present and describe the issues in this case from a unique perspective.

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* Federal Reserve Statistical Release, "Consumer Installment Credit — November 1980" (Jan. 12, 1981).

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The American Bankers Association respectfully submits this brief as *amicus curiae* to urge that this Court grant the petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit which held, for purposes of the Truth in Lending Act and the Federal Reserve System's Regulation Z, that an assignee was not an assignee and that an identified party was not identified. In doing so, the court acted inconsistently with the decisions of the Courts of Appeal of other Circuits, and in disregard of the principles laid down by this Court in the recent Truth in Lending case of *Ford Motor Credit Company* v. *Milhollin,* 444 U.S. 555 (1980). Inconsistent lower court decisions in Truth in Lending cases destroy the statutorily mandated goal of uniformity of disclosures, and this particular decision

subjects financing institutions of all types to potential, but previously unanticipated, liability.

As noted in the foregoing Motion, the amount of money devoted by the nation's commercial banking industry to the purchase of automobile dealer paper is now approximately $35.3 billion.[1] That great a sum translates into individual transactions numbered in the millions. If each of the millions of individual automobile buyers were to claim and recover "not . . . less than $100 nor greater than $1,000,"[2] for disclosures, or lack of disclosures—which harm no one and serve no purpose—then the effect on the industry would clearly be devastating.[3] Yet that could be the result should the decision of the Fifth Circuit stand unreviewed and unreversed.

SUMMARY OF THE ARGUMENT

Virtually any Truth in Lending Act issue is an important question of federal law which ought to be decided by the Supreme Court, within the meaning of the Court's Rule 17.1(c). If for no other reason, this is so because the Truth in Lending Act has engendered such a tremendous number of lawsuits in the federal courts and because the complexity of the law and the confusion

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[1] Federal Reserve Statistical Release, "Consumer Installment Credit — November 1980" (Jan. 12, 1981).

[2] 15 U.S.C. §1640(a)(2)(A)(i).

[3] No precise figures on the number of individual transactions are available, but if we assume that the average outstanding balance on automobile installment contracts is $5,000 — a very high estimate — then there are at least seven million individual transactions involved, and liability ranging from $700 million to $7 billion could be imposed on banks for failure to identify themselves *as* creditors, even though they are otherwise clearly identified.

stemming from the often conflicting results of that litigation have caused great uncertainties in an industry which affects millions of people every day. This Court's grant of writs of certiorari in two other Truth in Lending cases this term, following a Truth in Lending decision just last term, is a recognition of this problem.

The result reached by the Fifth Circuit in the case below is inconsistent with the decisions of other circuits in several respects, thus adding to the overall confusion surrounding the Truth in Lending Act. Moreover, the decision is incorrect. The Fifth Circuit held that the financing institution was not an "assignee" within the meaning of the Act — a decision having significant consequences for all financing institutions under what are fairly typical circumstances. This decision is inconsistent with the great weight of authority giving a commonly accepted commercial meaning to the term "assignee." The court below also held that the financing institution in this case was not properly identified within the intendment of applicable regulations. Here again, the decision flies in the face of fact, reason, logic, and authority.

This Court should grant the writ of certiorari in the case. With a decision here, and in the other Truth in Lending cases now pending before the Court, perhaps some semblance of order and predictability can be restored to this field of law.

ARGUMENT

I. This Case Presents Important Issues Of Federal Law Which Should Be Decided By This Court.

As indicated in the foregoing Motion of the American Bankers Association for Leave to File a Brief as *Amicus Curiae,* and in Ford Motor Credit Company's

Petition for Certiorari, the issue presented in this case is an important one in its own right, in that the outcome of the case will affect the validity of an enormous number of Truth in Lending disclosure statements now outstanding. But as important as the case is on its own merits, its significance grows immeasurably when it is placed in a larger context. Cases such as this and the two other Truth in Lending cases in which the Court has already granted certiorari in this term[4] will ultimately determine whether the Truth in Lending Act is to become the meaningful disclosure statute that Congress intended it to be, or will remain a confusing morass of often conflicting interpretations, with great liability premised upon the most insignificant details which are meaningless to the actual credit customers.[5]

The object of the Truth in Lending Act is clear enough. In 1967, the Senate sponsor of the bill, William Proxmire, described the problem to be addressed in these terms:

> Each segment of the credit industry quotes credit terms on a different basis. How many consumers

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[4] *Anderson Brothers Ford* v. *Valencia,* 617 F.2d 1278 (1980), *cert. granted,* _____ U.S. _____, 66 L.Ed.2d 242 (Nov. 10, 1980) (No. 80-84); and *American Express Co.* v. *Koerner,* 615 F.2d 917 (1980), *cert. granted,* _____ U.S. _____, 49 U.S.L.W. 3492 (Jan. 12, 1981) (No. 80-202).

[5] We do not exaggerate. This characterization is confirmed in *Consumer Credit Protection: A Report of the Commission on Federal Paperwork,* July 29, 1977, pp. 32-33:

> Controversies abound over interpretations of the law and regulation. . . . Novel and confusing constructions often result from a court's failure to recognize the business practices and terminology that relate to the law and regulations. . . . A frequent difficulty, then, for creditors under Truth-In-Lending and Regulation Z is determining precisely what is to be disclosed. This can be difficult in routine and standard transactions and almost impossible in more complicated ones.

> realize, for example, that a 6-percent automobile loan is really a true annual rate of 11 percent and sometimes more when measured against the declining balance. Other lenders use a discount rate. Still others use a monthly rate. . . . Some count all expenses in the rate, while others charge separately.
>
> Some lenders quote only the monthly payments.
>
> The end result is that the consumer is faced with a bewildering variety of credit terms and rate concepts. Unless he is a skilled mathematician, he is unable to make intelligent and simple comparisons between different sources of credit.[6]

Consequently, Congress wrote into the law that its purpose was

> to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him. Truth in Lending Act, §102 (15 U.S.C. §1601).

See also Ford Motor Credit Company v. *Milhollin, supra* at 568.

In order for disclosures to be "meaningful" and in order for them to be used for purposes of "comparison shopping" for credit, those disclosures need only be uniform. There is nothing intrinsically sacred about the specific methods of disclosure mandated by law and regulation — other methods could just as well have been selected, just as colors other than red and green could have been selected for traffic lights. One particular method was chosen solely to assure the necessary uniformity. And yet, somewhere along the line over the past dozen years, the concept of uniformity has been largely

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[6] *Truth in Lending: Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 2 (1967).

lost and this Court's own experience with Truth in Lending cases demonstrates the point:

• Before this Court's decision in the *Milhollin* case, *supra,* the need to disclose the existence of acceleration clauses in consumer credit contracts was open to serious question. Lower courts had decided the issue both ways, and for widely different reasons.

• Before this Court settled the law on the "Four Installment Rule" in *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), district courts in at least Florida and Illinois had reached one conclusion on the issues and the Fifth Circuit had reached a contrary one.

• In the *American Express* case now pending before the Court, *supra,* the issue involves the interpretation of a Truth in Lending Act provision governing the circumstances under which a credit card can be revoked. Again, the lower courts have decided the issue both ways.

• In the *Valencia* case, *supra,* the issue is whether one must disclose that returned or unearned insurance premiums have been assigned to the creditor. Again, the lower courts have come down on both sides.

• In this case as well, the questions of who is a creditor, and who is an assignee, and who must be identified as a creditor for purposes of the Truth in Lending Act have muddled answers because of irreconcilable decisions in the lower courts.

The fact that major confusion and inconsistency permeates the entire field of Truth in Lending law among consumers, courts and creditors is not surprising since the implementing regulation is 53 pages long —

consisting of 153 highly technical subsections — the Federal Reserve has issued more than 1,500 staff interpretations of the regulation since its inception,[7] and the federal courts have been hearing an average of about 100 Truth in Lending Act lawsuits every month for a dozen years.[8]

Thus, it appears that the responsibility for carrying out the Congressional intent to bring uniformity to the disclosures of the cost of credit devolves upon this Court and this Court alone.

II. The Court Below Erroneously Decided That The Financing Institution Was Not An Assignee.

Under section 115 of the Truth in Lending Act (15 U.S.C. §1614), a subsequent assignee is liable for the disclosure violations of the original creditor only where the violation is apparent on the face of the instrument assigned. In this case, the alleged disclosure violations included such things as the improper characterization of a $1.00 lien recordation fee and certain other documentary fees. Such alleged violations were not apparent on the face of the instrument. Consequently, it is important to determine whether Ford Motor Credit Company was an original creditor or a subsequent assignee in this case. In order to do that, the terms must be defined.

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[7] In fact, some of these interpretations revoke or modify earlier interpretations. *Compare*: Opinion FC-0029 with FC-0153; Opinion FC-0042 with FC-0164; Public Information Letters 735, 833 and 850 with Opinion FC-0157; Public Information Letters 265, 734, 864 and 1136 with Opinion FC-0165; Public Information Letter 1232 with Opinion FC-0152. (12 C.F.R. Part 226 Appendix).

[8] *Annual Report to Congress on Truth in Lending for the Year 1980,* Board of Governors of the Federal Reserve System, p. 3.

"Creditor" is defined by the statute (15 U.S.C. §1602(e)) and by Regulation Z (12 C.F.R. §226.2(s)) as one who, in the ordinary course of business, regularly extends or arranges for the extension of *consumer* credit. Consumer credit, in turn, is defined as credit extended to a natural person for personal, family or household purposes (15 U.S.C. §1602(h)). In the case of Ford Motor Credit Company and in the case of banks operating in a similar fashion, the financing institution is not a creditor within the meaning of the law because it does not extend credit to a natural person for any personal, family or household use. Rather, the principal purpose of the financial transaction here in issue is to enable the automobile dealership to operate its business. It is principally a commercial transaction which assures that the dealer remains in the business of selling automobiles, and is not forced into the business of collecting and processing monthly installment payments in order to have readily available in sufficient amounts the funds to pay for its merchandise. Consumer credit is, of course, extended in cases like this one, but it is extended by the automobile dealer, not the financing institution.

The terms "assignee" or "subsequent assignee" are not defined in the applicable statute or regulation. Where that is so, the rule of statutory construction established by Justice Story and this Court in 1824, and followed ever since,[9] must be applied: "Congress must be understood to use the word in its known commercial sense." *Two Hundred Chests of Tea,* 22 U.S. (9 Wheat.) 430, 438 (1824). In determining what is the normal commercial meaning of "assignee," a useful analog is the application of various state usury laws.[10]

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[9] *See* cases collected in 2A Sutherland, *Statutory Construction,* §47.31 (4th ed. 1973).

[10] It is another familiar rule of statutory construction that "the interpretation of a doubtful statute may be influenced by language of

Most of the states have enacted laws which prohibit the imposition or collection of interest in excess of a specified percentage on certain loans. But the courts carefully distinguish between loans and credit sales. Usury laws apply only to the former. Where a seller negotiates a contract with a buyer whereby the buyer may defer payment of the purchase price or may pay the purchase price in installments, a credit sale has taken place and the usury statutes do not apply. When a financing institution purchases the buyer's note, even close in time to the original transaction, that fact does not make the transaction a loan; rather it makes the financing institution an assignee.

In *Boerner* v. *Colwell Company,* 145 Cal.Rptr. 380 (1978), the defendant Colwell was a mortgage banker which purchased installment contracts for the sale of vacation homes. California had a usury ceiling of 10%, and the finance charge on each of the installment contracts in issue in that case exceeded the 10% figure. A plaintiff class claimed that the transactions, in substance, if not in form, were loans to the plaintiffs

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other statutes which are not specifically related, but which apply to similar persons, things or relationships." Sutherland, *Id.* at §53.03. Certainly that is the case with respect to the Truth in Lending Act and usury statutes under the facts here. This is a rule of construction that the Supreme Court has often applied. *See e.g., Overstreet* v. *North Shore Corporation,* 318 U.S. 125, 131-32 (1943) (construing similar language in the Federal Employees Liability Act and the Fair Labor Standards Act in the same fashion); *Indian Towing Company* v. *United States*, 350 U.S. 61, 67 (1955) (construing similar language in the Federal Tort Claims Act and the Suits in Admiralty Act in the same fashion); and *Fedorenko* v. *United States,*_____U.S._____ (49 U.S.L.W. 4120, 4125, fn. 28) (Jan. 21, 1981) (construing the term "misrepresentation" in the Displaced Persons Act in the same fashion as an earlier construction of the same word in the Immigration and Nationality Act of 1952).

from Colwell as the original lender, and, therefore, subject to the usury ceiling. The California Supreme Court's description of the transaction makes it clear that the transaction was virtually identical to the one in question in the instant case:

> [T]he financing institution occupied a central position in shaping the transactions from the outset. The buyers having determined that they would go forward with the contemplated construction of their vacation homes only if financing could be obtained, the builders set in motion a procedure whereby, in accordance with prior arrangements made by them with Colwell, the feasibility of financing *by Colwell* could be determined. Under this procedure the parties were supplied with forms developed and supplied *by Colwell* which essentially set forth the terms under which *Colwell*, through the device of contemporaneous assignment at a prearranged discount, would agree to finance the contemplated purchase and sale. Included among these terms was the finance charge to be paid by the buyers. *Colwell,* not the builders, passed upon the question of the buyer's credit reliability, and only when *it* determined that such credit reliability was acceptable *to it* did it agree to participate in the transactions as the financing agent.
>
> Plaintiffs [urge] that this kind of participation by the financing institution rendered it a "lender" of money within the meaning of the usury laws. *Id.* at 388-89 (Emphasis in original).

Nevertheless, the court affirmed a trial court finding that the transaction was a bona fide credit sale, not a part of a loan transaction clothed in the form of a credit sale, and that the assignment of the installment sale contract was a true assignment to Colwell, not a loan by Colwell in the guise of an assignment. *Id.* at

383. The court pointed out, in words equally applicable to the instant case, that

> [t]he role of the financing institution in transactions of this kind is basically a beneficial one, for *the essence of their function is that of providing needed financial assistance to sellers* unable to handle their own consumer financing, thus permitting those sellers to compete on a more equal footing with their more established competitors. *Id.* at 391. (Emphasis supplied.)

The court recognized an exception to this general rule, namely that the usury laws would apply where the assignment was not a good faith transaction, and was essentially a device to evade the usury laws. However, it found no evidence of lack of good faith on the part of Colwell.

Something akin to "good faith" considerations appears in the Truth in Lending Act as well. If a subsequent assignee takes a note with a disclosure error apparent on its face, then the assignee becomes liable to the customer as though the assignee was an original creditor. If no disclosure error is apparent on the face of the instrument, then the assignee's disclosure liabilities are diminished. 15 U.S.C. §1614. Since the alleged errors involved in this case are not apparent on the instrument, the financing institution remains a bona fide assignee and does not acquire the obligations of an original creditor.

Boerner is not a singular case. The California Supreme Court pointed out — correctly — that its decision conformed to the law in the great majority of jurisdictions. *See* cases collected at Annot. 14 A.L.R. 3d 1065, 1091-1112 (1967).

In summary of this point, a financing institution is generally held to be an assignee in cases where the relevant facts are identical to the facts here, applying statutes analogous to the one in issue here, where plaintiffs argue that the institution is not an assignee, but rather an original lender. Cases such as the *Boerner* case in the California Supreme Court have supplied a commonly understood commercial meaning to the term "assignee" and that is the meaning Congress must have intended in a statute also dealing with interest rates. Therefore, Ford Motor Credit Company, and similarly situated financing institutions, are assignees under the Truth in Lending Act.

III. The Court Below Erroneously Decided That The Financing Institution Was Not Identified.

Nothing in the Truth in Lending Act requires that the identity of creditors be disclosed to consumer borrowers. That obligation arises only from the Federal Reserve's Regulation Z, 12 C.F.R. Part 226.[11]

Section 226.6(d) of the Regulation requires only that each creditor shall be clearly identified. The ostensible reason for this requirement is well set forth in the opinion of District Court Judge Rubin in the *Cenance* case below:

> [T]he creditor's identity is not a frivolous or extraneous bit of information, and may be important in the borrower's decision to commit himself to a

[11] The Act itself was designed to assure that customers would have accurate and complete information about the *cost* of credit. The identity of the creditor has nothing to do with the cost of credit where that cost is uniformly disclosed. For this reason, Ford Credit argued in the district court that the Federal Reserve's promulgation of this section of the regulation exceeded its statutory authority. The argument, however, has not been preserved on appeal.

particular credit arrangement. Informed persons sometimes do not choose to borrow from a lender known to be difficult to deal with and exacting in its demands. *Cenance* v. *Bohn Ford,* Civil Action No. 76-2878 (E.D.La. April 14, 1977), reprinted in Petition for Writ of Certiorari, *Ford Motor Credit Company* v. *Cenance,* No. 80-1205, filed January 19, 1981, Appendix B, p. 18.

Keeping in mind that *"[m]eaningful* disclosure does not mean *more* disclosure," *Ford Motor Credit Company* v. *Milhollin, supra* at 568 (emphasis in original), it is clear that identification of a creditor *as such*, which is not required by a strict reading of the regulation in issue, supplies no useful information to the borrower above and beyond the information which is supplied by the mere identification of a "creditor." This is true even if the so-called "creditor" is described as a "subsequent assignee" in the disclosure document, and it would be true even if the designation of the "creditor" as a "subsequent assignee" was technically incorrect.

The simple fact of the matter is that Ms. Cenance *knew* the party to whom she would be making her monthly payments because that information was set forth explicitly on the Retail Installment Contract directly adjacent to her signature. If Ms. Cenance was an "informed person," or if she had reason to believe that Ford Credit was "difficult to deal with and exacting in its demands," then the clause in the contract purporting to assign the contract to Ford Credit certainly supplied her with sufficient information in this respect to make a "decision to commit [her]self to a particular credit arrangement." Calling Ford Credit a "creditor" rather than an "assignee" would not have added one whit to the information available to Ms. Cenance.

The dealer in this case, Bohn Ford, could have prepared its own form of Retail Installment Contract, without any reference whatsoever to either the possibility of assignment or to any particular possible assignee. It could then have decided, after the fact, to assign the contract to one of any number of financing institutions, entirely unbeknownst to Ms. Cenance until well after she entered into the agreement. In that event, no violation of the law or regulation stemming from a failure to identify a creditor would have occurred. That scenario would present a curious anomoly: Compliance with a disclosure statute may be achieved by supplying the customer with less than complete information, whereas an effort to supply complete information, as Bohn Ford and Ford Credit did here, somehow violates the statute. Ms. Cenance could have found herself obligated to some financing institution which she would not, under any circumstances, choose herself, and it would have been entirely legal. Here, she knew she would be dealing with Ford Credit, and still willingly entered into the contract. Yet she now claims that Ford Credit was in violation of the law because it was not "identified."

The court below has thus written into the regulation words that are not there, requiring that the financing institution not only be identified, but identified *as a* creditor. In doing so, the Court of Appeals acted in conflict with the decisions of the Sixth, Seventh and Ninth Circuits,[12] each of which has held that the form of identification of the financing institution used in this

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[12] *See: Augusta* v. *Marshall Motor Co.*, 614 F.2d 1085 (6th Cir. 1979); *Sharp* v. *Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980); and *Milhollin* v. *Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980).

case was adequate for purposes of the Truth in Lending Act and Regulation Z. This conflict should be resolved, and resolved in favor of the principles of "meaningful disclosure, not more disclosure."

CONCLUSION

For all of the reasons stated herein, the *amicus,* American Bankers Association, on behalf of its 13,250 member financial institutions, respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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